No. 7695

United States Circuit Court of Appeals
For the Ninth District

GUS B. GREENBAUM, CHARLES GREENBAUM and WILLIAM GREENBAUM,
Appellants,

—vs—

UNITED STATES OF AMERICA,
Appellee.

ADDITIONAL REPLY BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona

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Appreciating the privilege, granted by the Court, of filing this Additional Reply Brief, appellants shall endeavor to restrict the ensuing suggestions to the shortest possible space. The brief of appellee, however, contains so many erroneous statements of, and conclusions from, the evidence and misconceptions of the law, that the full protection of appellants' interests demands that appellee's brief be not permitted to go unchallenged.

It is said that appellants' statement of facts could be characterized as an argument but, as the Court will perceive, when it comes to consider the briefs and the

transcript of the evidence each statement made by appellants is completely and distinctly supported by the record. The full statement of the evidence and procedure below so persuasively indicates the strength of appellants' position that the errors committed by the trial court are apparent without argument. Probably the attempt to designate appellants' statement of the facts as argument is an old-fashioned method of gaining tolerance for appellee's statement, which is indubitably contentious.

Some of appellee's argumentative statements are: "We consider this of minor importance"; and, "we are confident that the evidence preponderates so overwhelmingly on the side of the Government"; and "the Court is well aware of the fact that items such as 'accounts receivable' * * * might not be worth ten cents on the dollar"; and the defendants "should have introduced some evidence" as well as many other plain attempts at persuasion in what is supposed to be a statement of the facts.

It is not only incorrect but unfair to state as a fact that one of appellants, preliminary to the organization of the Stores Corporation, accompanied A. E. Sanders to Tennessee when the Saunders franchise was obtained, when appellee's own witness, A. E. Sanders, positively testified that his counsel, Mr. Bird, was representing him (Sanders) and not appellants in the incorporation proceedings (346). The testimony of A. E. Sanders should not be forgotten, moroever, where, at a crucial point he testified on direct examination that one of appellants suggested the Arizona enterprise *and went with him to procure the Saunders license*, but on cross-examination said he didn't remember whether

this appellant went with him to Memphis or not (352).

Because of one remark of this Court on oral argument appellants respectfully direct the Court's attention to the fact that this chain store enterprise created in Arizona was, according to the Government's evidence, conceived in the utmost good faith, (349; 354) and that, as the result of appellants' activities between $800,000 and $900,000 in cash was delivered to the corporation by appellants, they drawing no salaries or other compensation from the company, paying their own expenses and dealing with the corporation and A. E. Sanders at arm's length. The events touching the delivery to them of some of Sanders' personally owned stock have been considered in appellants' opening brief (20).

In response to another inquiry of the Court as to whether or not appellants were the managers, or in control of the company, it may be said, without fear of contradiction, that the evidence discloses that appellants had nothing whatsoever to do with its business operation, with its management, with its property, with its funds or with its records. The enterprise was no "cloak" to cover stock sales operations. The corporation commenced business, made leases, opened stores, acquired warehouses, equipment, trucks and stocks of goods, and by the middle of 1930 had twenty-one to twenty-five retail stores in operation according to a letter written by Government witness Partee (Exhibit 54, Tr. 281, 287). According to this same letter, the company was then doing a business of over $2,000,000 a year. The company had warehouses in Phoenix, Tucson and Nogales. A complete discussion of the facts appears in appellants' opening brief, to which the

Court's attention is respectfully directed (pp. 10-44; 191-201; 201-217).

ARGUMENT

I

THE SUFFICIENCY OF THE INDICTMENT VAGUENESS AND UNCERTAINTY

No case has been found, and certainly none has been cited in appellee's brief, in which an indictment remotely resembling that at bar has been approved.

The defectiveness of the indictment was pointed out in appellants' original brief in two main divisions:

(1) — Its vagueness and uncertainty;

(2) — Its duplicitous nature.

The indictment charges in express language that the defendants devised and intended to devise a scheme to defraud *and* to obtain money by false pretenses made to induce various persons to purchase stock and debentures of the corporation (3, 7). This is expressly admitted by appellee (Appellee's Brief pp. 11-12).

No good purpose is served by the argument that the mailing of the letter is the gist of the offense and that the scheme need not be pleaded with that certainty which is required in pleading the use of the mails. The offense complained by Sec. 215 of the Revised Statutes does not contemplate, of course, the mere use of the mails but a use of the mails *in furtherance of a scheme*

to defraud. The whole phrase must be read without pause to make sense. If there be no use of the mails a fraudulent scheme is not cognizable under Federal law and if no fradulent scheme exists the use of the mails does not constitute an offense.

Even appellee's own case, *Brady* v. *United States*, 24 Fed. (2nd) 399, (Appellee's Brief 9) recognizes in its opinion that it is necessary "to charge the scheme with such particularity as will enable the accused to know what is intended and to apprise him of what he will be required to meet on the trial". The District Attorney neglects to observe the further part of the rule as stated in *Fontana* v. *United States*, 262 Fed. 283 (C. C. A. 8) (Appellants' Br. 95) that it is not only essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge he must meet, but it is also necessary that the scheme be pleaded "*so particularly as to enable him to avail himself of a conviction or acquital*". This complete statement of the rule is recognized in *Mathews* v. *United States*, 15 Fed. (2nd) 139, and other cases cited by appellee (Appellee's Br. 6). The latter portion of the rule neglected by the District Attorney, is vital to the inquiry concerning the sufficiency of the indictment.

As was contended by appellants in their opening brief, the indictment is vague and uncertain because, (1) it charges the offense of devising the scheme prior to the *dates* of the mailing of letters in the several counts of the indictment, and (2) it includes, within its allegations, averments of events having to do with the defendant H. D. Sanders, the Piggly Wiggly Hold-

ing Corporation, the U-Save Holding Corporation, the acquisition of control and the disposition of assets of the stores company, wihout any averment connecting these pleaded assertions with the scheme to defraud in the sale of stock and debentures by false pretenses. As to these allegations, in addition to rendering the indictment uncertain, they render it, also, guilty of duplicity, as to which a few words will be said in reply to the Government's argument upon the point of duplity.

As has been heretofore argued, the indictment was drawn upon the theory of a preconceived plan embracing seventeen counts, the allegations describing the scheme all being thrown into one omnibus first count and intended to be incorporated by reference in the subsequent counts of the indictment. It must be remembered that the so-called gist of the offense is the use of the mails by the letter of April 9, 1930 (13). On that date, therefore, the offense is alleged to have been committed and must be regarded as completed.

With the mailing of the letter charged as a violation of the statute the scheme, *so far as the consideration of the offense is concerned*, becomes a closed incident. Any changes in the alleged unlawful plan or in the fulfillment thereof by its devisers cannot be considered as a part of that scheme in furtherance of which the letter, charged as constituting the offense, was mailed. While subsequent events may have a retroactive bearing upon the question of intent, they cannot, in the nature of things, be said to constitute a part of an original scheme which must, with logical inevitability be completely devised, and intended to be

devised, prior to, or simultaneously with, the particular misuse of the mails for which punishment is demanded.

An inconceivably broad latitude was assumed, however, when, after sixteen counts of the indictment had been eliminated by demurrer, the Court, nevertheless, permitted the Government to prove any scheme which it might undertake to establish on November 23, 1928, the date of incorporation, and prior to any one of the sixteen dates on which letters and other literature are alleged as having been sent through the mails in the seventeen counts of the indictment, thus making it possible to prove a scheme to defraud at any day before February 19, 1931 (42). If, therefore, a scheme to defraud was attempted to be proved as being devised as late as February 18, 1931, then, under the Government's theory of the indictment, there would be such a scheme as would render criminal the mailing of the letter on April 9, 1930, ten months earlier. This restatement is believed to be helpful in view of the Court's question, during the oral argument, asking when appellants had severed their connection with the company and with the sale of its securities.

Under the evidence the separation of appellants from the enterprise occurred prior to the advent of the defendant H. D. Sanders, who was in the full swing of his operations by October 6, 1930 (281); Government witness A. E. Sanders testifying, "I don't think the Greenbaums had any connection whatever with the last two mentioned companies; (Piggly Wiggly corporation and U-Save corporation). These corporations were organized by my brother, H. D. Sanders." At another point Mr. Sanders stated that appellants

stopped selling the stock and debentures of the company "along in June or July, 1930" (355).

The defendants under the trial court's conception of the indictment could be called upon to defend against any evidence appertaining to any scheme which the Government might elect to attempt to prove even after appellants had no further connection with the enterprise. From a factual standpoint this is exactly what happened on the trial as is demonstrated by the record (42-44-50-56), and argued in appellants' opening brief at page 89, et seq.

Cases are cited by appellee such as *Chew* v. *United* States, 9 Fed. (2nd) 348 (Appellee's Br. 7) to the effect that the exact date of the formation of the scheme need not be alleged. Here, however, *many dates are alleged*, the District Attorney thus electing to abandon the general videlicit. In the *Chew* case, moreover, all counts remained in the indictment and the Court considered it as a whole. To the same effect are the other cases cited by appellee such as *Heney* v. *United States*, 44 Fed. (2nd) 134 (Appellee's Br. 7).

A careful examination of the authorities cited by appellee gives rise to the suspicion that many of the decisions used were not thoroughly read or that they were taken from *Corpus Juris* or some other general reference work. Such, for example, is *Munch* v. *United States*, 24 Fed. (2nd) 518 (Appellee's Br. 7), which is cited to sustain or justify an indictment which pleads that the scheme was devised prior to a number of dates. There is not a word to this effect in the opinion.

Appellants have no grave objection to charging the alleged scheme in patchwork parts, their objection resting upon the ground that events should not be pleaded as a part of an alleged illegal scheme which do not, and which cannot, by their inherent nature, belong to the puzzle.

Appellee cites *Brady* v. *United States*, 24 Fed. (2nd) 399 (Appellee's Br. 9), but it will be found upon examination of the decision that, while the indictment there under consideration charged the scheme in parts, there was no objection thereto and consequently no occasion for the Court either to approve or disapprove the practice.

The cases relied upon by appellee to the effect that the Government need not be specific in its allegation of the *date* at which the scheme was devised are not in point. The marked difference between such cases and the case at bar is that in the instant case too much was alleged and too much proved. In effect, the prosecutor had the benefit of the seventeen counts of the indictment even though demurrers had been sustained to sixteen of them, with the same effect, and as inimical to appellants' position, except as to the extent of the possible penalty, as if all of the seventen counts had remained, unassailed, in the indictment.

DUPLICITY

The brief of appellee contains hardly a pretense of an answer to appellants' brief upon the question of duplicity.

As has been said, the crime charged consists of two

elements (1) the devising of the scheme and (2) the mailing of one letter in furtherance thereof. What is the scheme charged in the indictment as fraudulent? Appellee answers this question at page 11 of its brief as follows:

> "There is but one scheme charged in the indictment and that was the scheme to obtain money and property by the sale of stock and debenture bonds of the Clarence Saunders Stores and its successors by false and fraudulent pretenses, representations and promises."

So also states the indictment (Tr. 2, 7).

The essence, therefore, of the scheme in furtherance of which the mails were used is, necessarily, the *making of false pretenses in the sale of the original stock and debentures* of the company. The indictment alleges the incorporation of the company, its capitalization, the permit to sell, the procuring of the Saunders License Agreement, the organization of the Bond and Mortgage Company, the issuance of common stock to Sanders, the payment of dividends out of capital and other events and transactions providing the background upon which is superimposed the following vital allegation:

> "It was further a part of said scheme and artifice and in furtherance thereof, that the defendants, for the purpose of inducing the persons to be defrauded to part with their money and property *in the purchase of common and preferred stock and the debenture bonds of said Clarence Saunders Stores, Inc.* and its successors would and did un-

lawfully * * * make false pretenses * * * to the persons to be defrauded * * * ".

Then follows fourteen specifications of misrepresentation after which the mailing of the letter of April 9, 1931—called the indictment letter—(Exhibit 43) is set forth.

But the prosecution was not satisfied with the allegation of a single scheme. The indictment went on and charged a set of facts having no conceivable bearing upon a scheme to sell the securities of the stores company by the use of false pretenses. As was pointed out in appellants' original brief, (p. 105) the indictment charged, as a part of the scheme, that the defendant H. D. Sanders and his associates organized the Piggly Wiggly Holding Corporation, changed its name to U-Save Holding Corporation which engaged in business in California, and that the U-Save Holding Corporation acquired control of the stock of the Stores Company, took charge of its assets and removed $100,000 of its merchandise, wrongfully, from Arizona to California. Certainly these events could not be a part of a scheme to defraud by false pretenses in the sale of stock and debentures of the corporation under consideration. These charges might constitute fraud against the corporation or its existing stockholders, but they possess no conceivable bearing upon a scheme to sell the stock of the Clarence Saunders Stores, Inc. under that or any other name which this corporation subsequently adopted.

The District Attorney, however, attempts no real justification for the insertion of these averments but, instead, openly admitted in this Court that the indictment was not in the best of form. Lame indeed is the

attempted explanation. At page 11 of appellee's brief it is said that "The gaining control of the company by the U-Save Holding Corporation and the removal of merchandise *might*, as claimed, be a fraud on stockholders but that would not prevent it from also being a part of the original scheme to defraud and obtain money or property by false representations." This inconclusive statement is not followed by any explanation as to how or in what possible manner such events could constitute a part of the original scheme. The silence of the prosecutor, it is submitted, is due to the utterly inexplicable character of these allegations.

After asserting that these averments might be part of the scheme the District Attorney contradictorally asserts that they simply constitute the means of carrying out the scheme (Appellee's Brief, page 12). The allegations, however, are pleaded not as a means but as a part of the scheme (6). How could the organization of the U-Save Holding Corporation be a means to the end of obtaining money from persons solicited to purchase stock of the original corporation? How could the acquisition of control and of the assets of the Stores Company constitute a means to that end? How could the attempt to trade the stock of the U-Save Holding Corporation for the stock of the company be a means of inducing persons *to purchase stock of the original corporation* by means of false pretenses? These questions must forever go unanswered by the District Attorney. The acts charged are different. The actors are different. The parties against whom the alleged illegal actions are directed are different and accordingly, the scheme is different.

When demurrers were sustained to the last sixteen

counts there was left a first count which was drafted in contemplation of an indictment based upon evidence submitted to the grand jury under which the seventeen counts were returned and the first count, so pleaded as to constitute part of the ensuing counts remained inescapably defective.

These allegations cannot be regarded as surplusage. Deliberately phrased sentences, nay, whole paragraphs, of an indictment charged as part of the scheme cannot be disregarded for a further reason, perhaps not suggested in appellants' original brief. It must be distinctly noted *that these averments are followed by still further charges coupling them with allegations of false pretenses made in connection with the H. D. Sanders events.* For the purpose of this argument the Court's attention is again drawn to the indictment charging that the defendants, in furtherance of the scheme, *for the purpose of inducing the persons to be defrauded to part with their money in the purchase of stock and debentures* of the company, would and did make false representations. (7). If the Court will now examine paragraph 10 of the specifications of misrepresentation (10) it will see, as one of the false pretenses alleged, the following: "*Exchanging your investment from United Sanders Stores, Inc.* to *U-Save Holding Corporation, gives you a better investment than you had before, even at the time you made your original purchase.*" (10). Thus it becomes immediately apparent that the H. D. Sanders and U-Save Holding Corporation allegations, coupled with the allegations of false pretenses specifically applicable thereto, cannot by any process of reason be disregarded as surplusage. And when it appears that evidence was offered and received in substantiation of this feature of

the indictment this Court will perceive that not only did the Government *plead* two distinct schemes but also attempted to *prove* them. Scheme number 1 consisted of alleged false representations in the original sale of stock. Scheme number 2 consisted of false representations in connection with the U-Save Holding Corporation and the attempt to trade its stock for the stock of the Stores Company. The conclusion is, therefore, inescapable, that these incongruous allegations were deliberately inserted, deliberately attempted to be proved and deliberately submitted to the jury.

Therefore, the allegations of the indictment here under attack, constituting as they do a separate scheme or device, rendered the appellants amenable to trial therefor, notwithstanding conviction or acquittal on the scheme to sell the original stock by allegedly false pretenses.

All of the cases cited by appellee contemplate a single scheme and reveal that no matter what methods were used by the different defendants or whether or not some knew of the activities of others or regardless of the time when the various defendants joined or separated from the criminal enterprise, *all worked to a common end, i. e., the devising of a single scheme and the culmination of a single purpose.*

In appellants' opening brief it is demonstrated that the District Attorney cannot now abandon these cancerous allegations because he elected to put in evidence, not only one, but six pieces of documentary proof. These were Exhibits 6 (213), 13 (219), 53 (289), 54 (281), 56 (289) and 64 (297).

It ill behooves counsel for the Government now to say that the indictment is not duplicitous because these allegations can be disregarded. They did not disregard them when submitting the case to the grand jury and they did not disregard them upon the trial but, instead, welded them into the case by the offer and receipt of evidence. It should be remembered that the Government's own evidence disclosed that in October, 1930, H. D. Sanders, the unapprehended defendant not only took charge of the corporation but removed all of its books to Los Angeles (258) and that, to repeat, with the appearance of H. D. Sanders, appellants' connection with the enterprise ceased. (Tr. 350).

During the oral argument Judge Wilbur inquired of the United States attorney whether the indictment in the instant case was similar to the indictment in the case of *Shreve et al* v. *United States*, No. 7460 now pending upon appeal in this Court. The indictment in the instant case is almost a replica of the first indictment in the Shreve case. The first indictment of the Shreve case was attacked on the ground of its duplicity, vagueness and uncertainty and was, as before stated, similar to the indictment in the instant case. If the Court will examine the first Shreve indictment in connection with the indictment in the present case it will see that both were probably drawn by the same United States Attorney. The present United States Attorney, following the case of *Arnold* v. *United States*, 7 Fed. (2d) 867, abandoned the first Shreve indictment to which a demurrer was eventually sustained and in resubmitting the case to the Grand Jury attempted to present an indictment identical in form with the indictment mentioned in the Arnold case, supra, *which distinctly separates the schemes.* There was no attempt

to join a scheme to defraud and one to obtain money by false pretenses.

The present United States District Attorney perceived the error in the first Shreve indictment and set forth the separate schemes in separate counts of the indictment and followed each separate scheme with the letters sent in pursuance of that particular scheme.

The Court will note that in the second indictment, drawn in the *Shreve* case (No. 7460), now pending upon appeal in this Court, the present District Attorney drafted an indictment in twelve counts, — the twelfth count being based upon an alleged conspiracy. The other eleven counts are based upon a violation of Section 338, Title 18, U. S. C. A. The first count attempts to describe "a scheme and artifice for obtaining money * * * by means of false pretenses, representations and promises, * * * ". This alleged scheme and artifice relates solely to the Security Building and Loan Association (see Volume 1 of the Transcript in No. 7460, pages 2 to 6 inclusive, for a description of the alleged scheme). Then follows counts 2 and 3 setting forth letters sent pursuant to the scheme attempted to be alleged in the first count of that indictment. Count 4 of the Shreve indictment also alleges "a scheme and artifice for obtaining money and property * * * by means of false pretenses, representations and promises, * * * ". Then follows the alleged scheme with reference to Century Investment Trust (see pages 16 to 20 of Volume 1, Transcript of the Record in No. 7460). Then follows counts 5, 6, 7, 8, 9, 10 and 11, setting forth letters sent pursuant to the scheme attempted to be alleged in count 4 of that indictment. It will be noted that in the second

Shreve indictment, the one now under consideration by this Court, the present District Attorney did not attempt to join "a scheme or artifice to defraud" *and* "a scheme and artifice for obtaining money by means of false pretenses, representations and promises" as was done by the former District Attorney in the first Shreve indictment, and as was done by the same District Attorney in the instant Greenbaum indictment, now pending upon appeal before this Honorable Court. In other words, in the second Shreve indictment the "schemes" were attempted to be separated, although the present District Attorney used very unfortunate language in the first count of the Shreve indictment by alleging:

> "that prior to the dates on which the several letters, statements and writings hereinafter referred to were placed and caused to be placed in the United States Post Office, *as hereinafter in the several counts of this indictment alleged*, * * * ". (Page 2, Vol. 1, Transcript of Record, in cause No. 7460).

thereby tying the first count of the indictment into all other counts *and into another distinct scheme* set forth in count 4 of that indictment. For a full discussion of the present Shreve indictment see argument beginning on page 129 of Opening Brief of Appellants in cause No. 7460, *Shreve et al.* v. *United States.*

Counsel for the Government say that they have found no case to sustain the proposition that the pleading of a scheme to defraud and to obtain money, etc. by fraudulent pretenses constitute the pleading of two schemes. They, apparently, did not search very

far because there are a number of authorities which hold that there is a difference between a scheme to defraud and a scheme to obtain money by means of false pretenses, representations and promises, for the reason that the statute upon which this indictment was drawn itself sets forth several schemes, any of which might be the basis of an indictment for the misuse of the mails.

We shall briefly analyze and discuss the history of the statute.

The indictment in the case at bar charges that the defendants devised and intended to devise "a scheme and artifice to defraud *and* to obtain money by means of false and fraudulent pretenses * * * ". That the scheme to defraud constitutes one basis for a prosecution under the mail fraud statute and the scheme for obtaining money and property under false pretenses constitute another basis for prosecution is demonstrated by the history of the statute and decisions thereunder.

The original Mail Fraud Statute, (Act of June 8, 1872, condemned "any scheme or artifice to defraud". This section was placed, without substantial change, in the Revised Statutes of the United States, 1873-4, as Sec. 5480. By the Act of March 2, 1889, the section was changed to read: "If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan * * * any counterfeit or spurious coin * * * ". Another amendment was passed by the Act of March 4, 1909, which enacted the criminal code and which included Sec. 215, and this is the provision under which the appellants were

indicted. The statute is now found to read: "Whoever having devised or intending to devise any scheme or artifice to defraud *or* for obtaining money or property by means of false or fraudulent pretenses * * * ".

In considering Sec. 5480 (the first amendment) it was held that the use of the disjunctive "or" showed an intention upon the part of Congress to bring within the "comprehension of the statute acts not theretofore criminal".

Lemon v. *United States*, 164 Fed. 953 (C. C. A. (8) 1904);

Culp v. *United States*, 82 Fed. 990 (C. C. A. (3) 1897).

That separate schemes are contemplated by the statute as it now exists and are indicated by the disjunctive word "or" is supported by the following decisions:

In *Busch* v. *United States*, 52 Fed. (2nd) 79 (C. C. A. 8, 1931), at page 82, the Court said:

> "It must be borne in mind that the charge here is not the use of the mails in carrying out a scheme to defraud, but the use of the mails in carrying out a fraudulent scheme to obtain money and property by means of false pretenses."

See also in this connection:

Moore v. United States, 2 Fed. (2d) 839 (C. C. A. 7, 1924);

Miller v. *United States*, 174 Fed. 35 (C. C. A. 7, 1909);

Beck v. *United States*, 33 Fed.(2d)107 (C. C. A. 8, 1929);

Beck v. *United States*, 145 Fed. 625, 626 (2nd Circuit);

McLendon v. *United States*, 2 Fed. (2d) 660 (6th Circuit);

Schwartzberg v. *United States*, 241 Fed. 348, 352 (2nd Circuit);

Emanuel v. *United States*, 196 Fed. 317;

United States v. *Smith*, 152 Fed. 542 (D. C.);

In *Moore* v. *United States*, 2 Fed. (2nd) 839, the Court said, at page 841:

> " * * * Of the holding by this court in *Miller* vs. *United States*, 174 Fed. 35, to the effect that counts of the indictment there under consideration contained 'no averment whatever respecting the value of such stock so to be exchanged for the $5,000, it may be said that the case arose under the law as it was before the amendment of March 4, 1909, * by which there was added, after the then existing clause, 'whoever, having devised or intending to devise any scheme or artifice to defraud,' the words, 'or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.' *The added words*

were evidently intended to enlarge the scope of the act, and to denounce and punish the use of the mails in execution not only of a scheme to defraud, but also of a scheme to obtain money or property by means of false representations or promises, and would in its terms include any scheme to obtain money from another by means of false pretenses, under circumstances where, but for the false pretenses or promises, the money or property would not have been parted with."

Scrutinize appellee's brief as it will, the Court will find not a single case and not a single reason having a remote approach to soundness offered in justification for this strange indictment and stranger proof.

II

THE ACCOUNTANTS' FINANCIAL STATEMENTS

Exhibits 89, 90 and 91

Appellee admits that the financial statements prepared by L. D. Null, (Exhibits 89, 90 and 91) are admissible only if the books and records upon which they are based are admissible (Appellants' Brief 19) and counsel for the Government direct their argument mainly to the point that these exhibits, and the books and records underlying them, do not constitute hearsay as to appellants. The objection as to hearsay was but one of the points urged to these exhibits. Appellants' objections were based upon the following additional grounds:

That all of the books and records upon which these exhibits were based were not even in Court.

That such of the books as were in Court were not properly identified.

That the books so presented in Court were themselves but summaries and not original entries (370).

That they were not identified at all for an important period of the corporation's existence.

That they were shown to be incorrect and to have been falsified by the man who identified them.

That no reasonable opportunity for examining the books for the purpose of checking the financial statements received in evidence as exhibits was afforded to appellants.

That these exhibits showed conditions at an end of the period without any indication of what the conditions were at the time of any alleged misrepresentation on, or prior to, the date of the offense, April 9, 1930 (Appellants' Br. 73).

At the outset it must be observed that Exhibits 89 and 90 (366, 374) were profit and loss statements for the year 1929 and for the first nine monthe of the year 1930, respectively, and that they were but part of a 207 page audit prepared months earlier for use in another matter entirely (360).

The witness Null not only said, as is stated in Ap-

pellee's brief at page 31, that in order "to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369), but he made another important admission, which appellee neglects to observe, as follows:

> *"I would not vouch for the accuracy of that balance sheet in the absence of the missing books, and in the absence of my experience in the first audit"* (383).

It is true that on rare occasion, the Court has permitted books of account in evidence, or expert statements prepared therefrom, even when the party against whom they are offered is not responsible for the entries. No case has gone to the extent, however, which the District Attorney requests the Court to go where the party against whom such books or such expert statements are offered is shown to have *no knowledge* of them. When the cases are examined we find no such situation as exists at bar. The authorities relied upon by appellee, *Butler* v. *United States*, 53 Fed. (2d) 800; *Barrett* v. *United States*, 33 Fed. (2) 115; *Stephens* v. *United States*, 41 Fed. (2d) 440, and cases of that ilk, were dissected in appellants' opening brief (see pages 143, 152 and 155). As was there said, the opinion in the *Barrett* case expressly states that, "to make the fact of receipts and disbursements material, *the Government, of course, must show that Barrett knew, at least in general, how the money was being spent.*" And the Court said further "if the books are necessary evidence they must be identified as required by the case of *Phillips* v. *United States*, (C. C. A.), 201 Fed. 259." The knowledge attributable to Barrett was

not to any degree attributable to appellants under the undisputed evidence.

In the *Stephens* case (Appellee's Br. 30) the 250 volumes of books and records were kept for convenience in the Court House and the auditors and bookkeepers, after examining them, testified positively that they were the books and records of the company and *all of such books and records of which they had any knowledge.*

In citing and quoting from *Butler* v. *United States*, 53 Fed. (2d) 800 (Appellee's Br. 20), counsel neglect to advise this Court that in that case every precaution was taken to assure the defendant of an opportunity to check the audit by furnishing him with a copy and "*by affording ample opportunity to cross-examine*". In the *Butler* case, moreover, the question of the sufficiency of the evidence was not even properly before the Court because, as was said in the opinion at page 806, "There was no objection * * * to the sufficiency of the identification. * * * no assignment of error being directed to the identification of the books, the bill of exceptions properly omited a colloquy between Court and counsel, which is set out verbatim in the brief, *and in which further identification was waived.*" (See Appellants' opening brief 155).

No adequate answer whatsoever is made to the other points attacking these exhibits and the books and records. That all of the books of original entry were not even present in Court is admitted. That those volumes which were upon the counsel table of the Government during the trial were but summaries was expressly admitted, nay, insisted upon, by counsel for the Gov-

ernment, Mr. Dougherty, of counsel for the United States, persisting in the statement that, "These books *are a summary*, your Honor, of the original entry books." (370).

Upon the oral argument the Court asked counsel for the Government what books were not in Court and the question was not answered. The answer appears, however, in the testimony of one of the Government witnesses, Mr. G. C. Partee, who stated (259), "These are not all the books that were kept by the company. This was a rather large concern and there are a lot of detail books." After stating that the stock ledgers and stock subscription journal were not present the witness continued; "there are other books that are not here, such as the accounts receivable and accounts payable and the detail record of the operation of the various stores, and things like that. I would call the operation of the Stores operating accounts used as detail information *and then at the end of the periods transferred to the general books, which are here.* No inventories are available here. *The monthly statements are not here.* * * * the detailed operating records were kept in permanent form, I would say. Monthly trial balances were made throughout the time I was with the company * * * there were several operating books in which operating accounts were kept which I could not name at the present time, *but they are not here.*"

Is such a condition of the record comparable to the situation as it existed, for example, in the *Stephens* case or the *Butler* case, supra?

Since there were monthly operating statements and

profit and loss statements and other records showing conditions as to profit or loss exactly for each month, and since these were not introduced in evidence or produced in Court, and no excuse offered for the failure so to do, and no reason suggested why they could not be produced, the presumption must be that the probative purport of such evidence, if produced, would be against the party who failed to produce it.

Missouri, K. & T. Ry. Co. v. *Elliott et al.* (C. C. A. 8) 102 Fed. 96 and cases cited on pages 102 and 103 (affirmed 184 U. S. 695 without opinion).

To appellants' point that there was no identification of the books whatever, even by Brandt, for the period commencing with the organization of the company to the date of Brandt's employment, a period some ten months in duration, appellee makes no answer worthy of consideration and such answer as is made does violence to the record. This contention appears on page 27 of appellee's brief where counsel, speaking of Brandt's testimony, said, "He further testified that, covering the period prior to his employment, he had made an audit balancing the books and that all entries were correct." What the witness actually said was that, "insofar as the entries in these books which I have identified are concerned, I would say that they are true and correct *insofar as my supervision extended.* The books were not in balance when I went there; we went back and audited them *and balanced them.*" (253).

This Court will quickly notice that he did not say, as appellee purports to quote him, that he had made an audit balancing the books *and that all original entries*

were correct after the balancing operation. Books may be balanced by many means and by many devices known to accountants. What missing items, if any, were charged off? What were charged to profit and loss? What did Brandt do when he said he audited or balanced the books? To say that he made and audit is to testify to an unadulterated conclusion.

In view of the grave misstatement of the evidence appearing in the brief for the Government, it is vital that Brandt's testimony on this point be further quoted *in haec verba* because, without identification, there can be no allusion to books and records and without books and records there can be no expert statements. Brandt testified (253):

> "Q. In so far as the original entries are concerned prior to your employment, you cannot say whether the books are correct or not?
>
> A. Through an audit yes.
>
> Q. Will you kindly listen to my question? I said as to the original entries made in the books of the corporation, you cannot say whether they were true or not, prior to your employment anyhow?
>
> A. *No.*"

It needs no further argument to demonstrate that the books were incomplete when Brandt arrived and that they were falsified while he was present.

The contention that appellants should have sought

for and audited the books of the Stores Corporation while they were awaiting trial, smacks of absurdity. How could appellants know the method or the extent of the proof which would be offered against them? More than that, however, it would be utterly inconsistent for appellants to attempt to sustain their innocence by introducing in evidence books and records which had been kept under the supervision of an embezzler who falsified them for the purpose of covering his own peculations committed one week after his appointment as treasurer of the company (248, 422).

As to exhibit 91, and to a somewhat lesser extent, as to exhibits 89 and 90, appellee makes an argument which, in a criminal case, is astounding. Exhibit 91 is a balance sheet as of September 30, 1930 which purports to show the condition of the company, as to its assets and liabilities, on that date. Bearing in mind that appellants are charged with devising a scheme to obtain money by false pretenses, this Court will at once see that the jury could have studied this exhibit exhaustively without being able to determine whether any representation alleged as having been made by appellants was true or false. The case of *Mandelbaum* v. *Goodyear Tire and Rubber Co.* (C. C. A. 8), 6 Fed. (2d) 818, cited in appellants' opening brief at page 158, is not only not discussed in appellee's brief, it is not even mentioned. There the Court rightly held that an expert statement made by accountants at the end of a period, and showing conditions on that date, furnished "*no proper index of the condition of the company six months before that time.*"

Sometimes enlightenment comes when a proposition is viewed in its reverse aspect. Assume that ap-

pellants, to disprove the alleged misrepresentations asserted as having been made at various times, some of them long prior to September, 1930, had offered in evidence a general balance sheet as of that date. Of course, it would be held that such a document would have no probative value. And, it is submitted, appellants could no more prove their innocence by showing a general condition six months after an alleged misrepresentation than the Government can prove the falsity of such a pretense by similar evidence. In other words, it would be impossible for appellants to prove that the corporation was in prosperous condition by showing a balance sheet as of September 30, 1930 in a general summary, specifying no dates, and it must necessarily be likewise impossible to prove that the company was not in a prosperous condition six months prior to the date of the balance sheet.

As has been said, the financial statements rested upon the books and records and the books and records were not introduced, were not all present, were not books of original entry, and were identified by a man whose undoubted vulnerability the Court refused appellants the opportunity to demonstrate.

III.

THE INADMISSIBILITY OF THE INCOME TAX CARDS.

(Exhibits 109 and 110).

Perhaps the most obvious and unprecedented, fatal, error committed by the trial Court was the admission of these exhibits. As has been heretofore stated their

purpose was to prove that the company had a loss for the year 1929 and also in the year 1930, as to which the return was filed by the receiver on October 3, 1932, and thus attempt is made to establish that the representations were false and that the payments of dividends were wrong. In other words, this was a method of establishing what the facts were at the time the representations were made and the dividends were paid—obviously a vital subject.

The original returns or duly certified copies thereof were available and, as has been heretofore sufficiently argued, the courts, over and over again have held that where such returns are admissible at all such only is the proper method of procuring their introduction in evidence. (Appellants' Brief 169-170).

The Court need only to look at these exhibits to perceive their character. Mr. Davidson, under whose testimony they were introduced, said only that they were kept in his office but that he had no knowledge of the entries or whether they were true or correct or even whether the purported totals were accurately copied from the returns. Without attempting to reargue Appellants' position in this connection, it is asserted merely that:

We do not know what the original return showed.

We do not know when the losses occurred.

We do not know why the losses occurred.

We do not know who prepared the returns.

We do not know who signed the returns.

We do not know from what sources they were compiled.

All these exhibits represent is a copied conclusion as to the correctness of which there was no testimony.

The Court should bear in mind that there was no showing whatsoever that appellants knew of the returns, or of their filing, or of their contents, and certain it is that the record positively discloses that they had nothing to do with the sources from which the original income tax returns must have been compiled.

Attempt is made to distinguish *Corliss v. U. S.* (C. C. A. 8), 7 Fed. (2d) 455, relied upon in appellants' opening brief (see page 171). In that case, as here, the indictment charged a violation of the mail fraud statute. There, as here, an attepmt was made to add to the evidence already introduced, copies of the income tax returns, three of which were admittedly identified as being correct and the originals of which had been signed by the defendants themselves.

The reason for the decision was founded upon the axiom that the copies of the returns, even though identified as correct copies, *did not constitute the best evidence of what they purported to show.* Appellants beg leave again to call to the Court's attention the language of the opinion; "Before they could be received in evidence, the fundamental rule required the Government to show that the original documents could not be produced. * * * the very nature of the papers proved that such a showing could not have been made * * *. A more flagrant violation of the best evidence rule

could hardly be conceived * * (and) *For this error the case must be reversed.*"

Whatever was the purpose of the introduction of these copies of the returns, the *Corliss* case demonstrates that the attempt to prove them by anything other than the best evidence thereof is improper.

The Government attempted to distinguish the Corliss case on the ground, also, that the exhibits under consideration were Government records and presumably correct. Correct, it may be asked, as to what? Certainly they could not be correct as to proof that the company suffered losses and equally certain they could not be introduced as an admission against interest because they were not admissions made by appellants or even statements of which appellants had any knowledge or connection. The preposterous argument is advanced that these exhibits were offered to show *the act of filing returns*, which returns showed losses. This contention is meaningless. The mere act of filing returns was a purposeless event but when there is added to the statement that the exhibits were filed for the purpose of showing returns *which exhibited losses*, the Government necessarily gave to the jury an ultimate conclusion of fact unsupported by underlying data, unsupported by the man who made them, and unsupported as to correctness.

There was no limitation in the offer of these exhibits in evidence. The jury were permitted to draw from them any conclusion they saw fit.

In *Shepard v. United States*, (290 U. S. 96) 78 L. Ed. 196, Judge Cardozo in rendering the opinion of the

court and in speaking of the proof of a dying declaration contended by the Government to have been offered merely to show a state of mind, said:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds * * * It is for ordinary minds and not for psycho-analysts, that our rules of evidence are framed. They have their source very often in questions of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out * * *. The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by someone not the speaker. Another tendency, if it had any, was a filament too fine to be disentagled by a jury."

And so in the case at bar. To attempt to urge that the income tax cards were presented to the jury for the limited purpose announced in appellee's brief, and not for the purpose of proving losses, is "a fillament too fine to be disentagled by a jury" listening to a mail fraud case.

Counsel for the Government attempt to justify the introduction of these exhibits by affirming that they were Government records and as such "no other identification was necessary." Identified or not, the exhibits carried with them not a single evidentiary virture. The cases cited by appellee, *Heike v. United States*, 192 Fed. 83 and *White v. United States*, 164 U. S. 100, were anticipated and adequately analyzed

in appellants' opening brief at pages 176 and 177. The adversaries argue that in those cases the Government agents observed the facts which they recorded and that in the case at bar a Government agent recorded a fact which he observed i. e., a return filed. Such agent, however, did not observe the "loss" or the records which reflected it. He observed, if anything, an income tax return compiled and signed by someone whose name as well as whose presence remains, so far as this record is concerned, an utter mystery. The fact that the name of the receiver appears upon Exhibit 110 does not indicate that the receiver prepared or compiled the return or that he signed it, or that he or any representative of his had knowledge of the facts, by virtue of the records of the corporation or otherwise, which necessarily are required to support the returns. As to Exhibit 109, indeed, the name of the president and the name of the treasurer was filled in with a question mark.

There is a virtual confession of error with respect to these exhibits in appellee's brief where, at page 35 it is said, "even if erroneous (these exhibits) could not possibly be *prejudicial enough* to warrant the reversal of this case for a new trial." Since when is the Court required to measure prejudice? Is it a matter of degree? Where does the Court begin and where stop, once it be conceded that the omission or rejection of evidence is to any extent prejudicial?

It is impossible to tell at this time what effect was given to these exhibits by the jury. And, as said by one Court, "It is a poor time for the district attorney to say, after fighting evidence into the record, it did no harm," and, as stated by appellee,"it was not *prejudi-*

cial enough." The jury may well have disbelieved the accountant Null. They may have considered that the books were not sufficiently identified. They may have realized that appellants did not have opportunity to examine the voluminous audit or the books which were in Court and, above all, they may have questioned the identification of the books which were in Court by the witness Brandt. The moment these cards went into evidence the jury, in their lay judgment, probably said to themselves, "Here are Government records. They must be true." They would not stop to indulge in the fine-spun reasoning advanced by a District Attorney struggling to sustain a conviction.

Why, if satisfied with the proof of the financial condition of the corporation, did the Government offer these income tax memorandum cards? The conclusion is inescapable that it was only after extreme difficulty and hesitation that the Null summaries were received, based as they were upon books, not of original entry, which books had been identified by a man squirming in fear of the revelation of his own misconduct and as to whom the trial court had erroneously prevented a proper attack upon his credibility and a proper attempt to destroy his statement upon direct examination that the entries in the books were true and correct. In short, because the whole evidentiary structure of the Government's case wobbled upon a precarious foundation, under the incomprehensible ruling of the trial court, these exhibits were permitted in evidence. The scant three pages in appellee's brief subtract nothing from the presentation of the point by appellants in their opening argument. (See appellants opening brief pp. 77-166 et seq.).

IV.

THE ERRONEOUS RESTRICTION OF THE CROSS-EXAMINATION OF TOM BRANDT

That appellants possessed the means to force this witness to admit that he had testified falsely, and to admit that he had made a fictitious entry in the books of the corporation to cover a thieving transaction of his own, cannot be gainsaid. Fear of this witness and of the probable disaster attending upon his presence as the Government's chief support is, as has been heretofore said, a moving reason why the income tax memorandum cards were grasped as a last minute effort to save the case. His importance to the Government is fully discussed in appellants' opening brief at page 179 et seq. Without Brandt there would have been no identification of the books sufficient to afford even the semblence they did of a basis for the Null statements. The Null summaries were no better than the books and records which they purported to summarize. The books and records were no better than their identification and authenticity. The identification and the "circumstantial guarantee of authenticity" were no better than the witness who did the identifying.

In large part the foundation of the Government's case insofar as its burden to prove beyond a reasonable doubt the falsity of the representations be concerned, rested upon Brandt's statement that the books were kept in the regular order of business (257) and that the entries were true and correct. If Brandt could have been impeached the case would be left with no proof at all of the alleged falsity of the representations because there would have been no identification, by a credible

witness, of the books and consequently no foundation for the Null summaries. Brandt admitted one important false entry which the Court recognized and which the witness designated as a "fictitious entry." The witness then attempted to make an explanation for the purpose of relieving himself of the imputation of dishonesty and to give to his act an innocent aspect. He was permitted to testify that the fictitious entry involved a harmless transferring of funds to the Phoenix Packing Company which he said was to be repaid by the Kansas unit (a concern, by the way, with which the Governmnet must admit, appellants had no connection). The sharp distinction between a fictitious entry which is innocent of any wrong doing and a fictitious entry which is made to cover a criminal abstraction of funds by the same man who makes the entry, is apparent. *As was suggested by this Court upon the oral argument, appellants were stopped by the trial judge in their attempt to develop that the explanation of the fictitious entry was in turn false and constituted indubitable perjury.* This Court may well ask itself the question, "Would it make any difference, in its consideration of Brandt's testimony, whether the fictitious entry was made with an honest intent or with the intent to embezzle the funds of a corporation whose treasurer the witness was elected to be one week before his tortious and criminal embezzlement of its funds? Is it not law and logic and justice that, once a grave irregularity appears, a trial court should painstakingly and eagerly attempt to ascertain all of the facts touching the irregularity?

There, before the Court and before the jury were counsel for appellants who knew Brandt to be an embezzler and a jerjurer, possessing the ability by vir-

ture of a signed confession to force the admission of the theft and of the perjury from the witness' own lips. And they were stopped by the preemptory ruling of the trial judge. Here, before this court, is the District Attorney vigorously contending that the conviction should be upheld, based though it is upon the testimony of Brandt, relying upon the thinnest of technicalities. Our adversaries contend (appellee's brief, 37) that "to impeach a witness by showing a prior contradictory statement, a proper impeaching question must be asked. This question must fix the time and place of the prior statement and the question laying the foundation for impeachment must, in addition, acquaint the witness with the substance at least, if not the exact words, of the alleged prior statement."

This witness was shown his own signed confession in open court (DEFENDANTS' EXHIBIT "E" FOR IDENTIFICATION, Transcript of Record, 417, 419). Could counsel for appellants have followed the rule urged by appellee more strictly?

The District Attorney is strangely mistaken in his explanation of defendants' Exhibit "F" for identification consisting of four (4) checks drawn to the order of this witness by the Phoenix Packing Company upon its account in the Valley Bank of Phoenix, Arizona, and signed by the same Brandt on behalf of the drawer (422, 423). The funds upon which these checks were drawn were deposited to the account of the Phoenix Packing Company by Brandt on behalf of the Stores Corporation. Brandt testified, "Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry and I showed it as a check to the Phoenix Packing Company for $5,000.00 and on the

duplicate voucher *I showed a charge again the Kansas unit * * **" (418). He said further, "It is not a fact that the shortage was my own personal shortage" (417). The checks on their faces, however, show that they were drawn upon the Phoenix Packing Company account, which had been augumented by the funds of the Stores Corporation, to Brandt or order *and they were endorsed by Brandt.* The checks drawn upon the Phoenix Packing Company account were not deposited in the Citizens Bank at five points at all as Brandt testified, (418) but, with the exception of two smaller ones, they were deposited in the Commercial National Bank in which Brandt personally had accounts (419). This appears upon the exhibits themselves (422-423) and from Brandt's own signed statement (419). A perusal of defendants' Exhibit "E" for identification (419) is all that is necessary, it is submitted, to induce this Court promptly to reverse a conviction bottomed upon records the authenticity of which depend upon the testimony of the man who, when caught, admitted in writing his own wrong doing. This is the man who, in rank perjury, testified that "it is not a fact that the shortage was my own personal shortage."

It is urged by appellee that there is no specification of error on the refusal to admit defendants' Exhibit "E" for identification (Brandt's signed confession). Ample assignments and specifications of error were made in connection with the restriction of the cross-examination and this Court has specifically held that voluminous assignments of error are improper and that it is sufficient to make assignments raising typical questions. *Shreve et. al.* vs. *United States*, 73 Fed. (2d) 542, 543). This technical attempt to evade the fatal effect of the trial Court's ruling detracts not a

jot nor a tittle from either the form or the substance of appellants' contentions in this connection.

Under the ruling of the supreme court of the United States, *Alford v. United States*, 282 U. S. 687, cited in appellants' opening brief at page 188, it is clear that no offer of proof is ordinarily necessary in cross-examination.

Counsel for the Government cite and quote from *New York Central R. R. Company v. Dunbar*, 296 Fed. 57 (Appellee's Br. 38) which seems to hold that in confronting witnesses with alleged contradictory statements which contain some relevant and some irrelevant testimony and some statements which are not in contradiction with the testimony in Court, and some which are, such statements may be properly excluded. But, said the Court, "*the trial court gave full opportunity to counsel for plaintiff in error in using the statements, where any contradictions existed.*"

The exhibit as contained in the Transcript of Record *embodies no statement consistent with Brandt's testimony.* If the original happened to contain, as it does not, statements consistent with the testimony it was incumbent upon the District Attorney to insist upon its inclusion in the transcript.

That no offer of proof is required is established by *Alford v. United States*, 282 U. S. 687, where, among other things, the Court said that "*the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.* (to cross-examination) * * * It is the essence of a fair trial that a reasonable latitude be given the cross-examiner, even though he is unable

to state to the Court what facts a reasonable cross-examination might develop. *Prejudice results from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them*". And, we may well say that, in the instant case, the denial of the opportunity to place Brandt in his proper setting and put his credibility to a test caused the jury to fail fairly to appraise him. (See Appellants' opening brief 188, 189).

What would have been the verdict of the jury if this chief Government witness called and re-called upon all phases of the case, had been forced to admit that he committed perjury when he testified that all the entries under his supervision were correct and that he had taken company's funds one week after he was put in a position as treasurer to handle them? The answer to such questions may only be found in fairer trials than that to which appellants were subjected.

V, VI and VII.

Under the points V, VI and VII of appellants' opening brief, appellants, by specific references to the record and pertinent citation of authorities demonstrated conclusively that the Government failed to prove, by competent evidence, certain material allegations of the indictment, that in the introduction of evidence the Government attempted to prove two distinct and disconnected schemes to defraud and that, instead of proving the offense as layed, introduced evidence affirmatively disclosing that there was no combination in unlawful intent or activity on the part of the defendants.

Because the attempted answer by appellee does not meet appellants in a full and fair discussion upon these grounds but contents itself with a few scattered allusions to the record and the citation of authorities laying down general rules having no particular application to the case at bar, it is believed to be unnecessary, in this reply to do more than request the Court again to peruse appellants' original brief upon these points after it has read the brief for appellee.

Appellee's contentions as to the Driscoll letter (Exhibit 43), which is conveniently called the "indictment letter", have been adequately and completely replied to by appellants' first reply brief (Appellants' Reply Brief 4-25). Only one statement need be added in this connection and that is that it does not appear from the transcript what, if any, of the Loveland letters were shown to the jury to enable them to make comparisons. Many of the documents introduced by the Government were not exhibited to the jury at all by reason of interlineations and superimposed comments inscribed after delivery to the recipient. The record is silent as to whether or not any opportunity was afforded the jury to examine or even look at the alleged signature of "M. Loveland".

In order that there be no misunderstanding about the evidence with reference to the payment of dividends, appellants beg leave to repeat that the payment of the dividend on June 29, 1929 alleged in the indictment (5) *was not proved* at all while the payment of a dividend for June of 1930, a year later, *was not charged in the indictment* and appellants, accordingly, had no notice or knowledge that they were going to be confronted with this event upon the trial.

As to the payment of the dividend in December, 1930, the same unbelievable witness Brandt testified that he told A. E. Sanders that the company had no funds with which to pay a dividend at the end of December, 1930 in the presence *but not necessarily in the hearing*, of the appellant Gus Greenbaum. It is significant to observe that Brandt testified that when he made this statement to Sanders *Gus Greenbaum said nothing.* (330). This versatile witness also made the utterly inconsistent assertion, upon the witness stand, that he prepared a statement from the books of the company for December 31, 1929 and delivered a copy thereof to appellant Gus Greenbaum as well as to a number of trade creditors for the purpose of enhancing credit standing. (263). The witness distinctly said that after the financial statement of December 31, 1929 was prepared, "it was handed to Mr. Gus Greenbaum *as a true and correct statement of the financial condition of the company.*" (334). He said, further, that none of appellants had anything whatsoever to do with the preparation of that statement nor with the books and records of the Stores Company nor with the entries in such books and records. (334).

This statement so prepared by Brandt (Government's Exhibit 40) discloses cash on hand as of December 31, 1929, $51,326.72 and a surplus of $33,780.46. (335). It is hardly conceivable that a surplus of any kind can be created early in a corporation's operations when it is, at the same time, suffering heavy operating losses. The testimony of this witness, who, with deep justification has been assailed heretofore, as to the condition of the company on December 31, 1929, is so plainly self-contradictory that, like the story of his fictitious entry, it is simply unworthy of belief. Upon this point

of the payment of the dividends for December 31, 1929, therefore, the jury were offered two statements of fact, one of which the Government renounces and as to the other it demands full benefit. Had appellants elected to make a complete defense upon this charge they could have done no better than to introduce Brandt's financial statement and this, in an unwary moment, was done for them by the District Attorney.

VIII.

THE SUBSTANTIAL PRACTICES INSTRUCTION

No true effort is made by appellee to sustain the instruction of the Court to the effect that only enough need be proved to satisfy their judgment against the presumption of innocence and that one or more of the "substantial practices" alluded to in the indictment as fraudulent was wilfully employed and that the question for them to determine was whether enough had been proved "within the lines of the charge" and not whether all has been proved. (460, 522). The only response to appellants' contentions in this regard amounts to the proposition that in order to except to an instruction a defendant must mention each word thereof. Rule 30, quoted by appellee states that exceptions may be taken to a charge to a jury "specifying by numbers of paragraphs (the instructions in the case at bar being unnumbered), *or in any other convenient manner*, the parts of the charge being excepted to. The Court's attention is respectfully directed to appellants' opening brief upon the subject of this instruction, at page 217.

IX.

THE COMMON KNOWLEDGE—LOTTERY SCHEME INSTRUCTION.

Appellee's assertion that no exception was taken to the instruction noted in specification of error number 20 is an inexcusable misstatement of the record and it is the only attempt made to avoid the error of the trial Court and appellants' argument thereon.

Before the jury retired to deliberate upon their verdict the following exceptions were taken by counsel: "I want to take an exception, your Honor, to one of the instructions, which says: 'That one of the substantial practices'—I think that is erroneous without defining what is a substantial practice and *when the Court alluded to a lottery scheme and refers to cupidity, I think that is erroneous.*" (481).

Assume that the trial Court had instructed the jury that eagerness to take chances for large gains lies at the foundation of all counterfeiting schemes, or of the sawdust swindle, or of dealing in green coin, green goods or spurious treasury notes, what effect could such an instruction have upon the mind of a jury sitting in the criminal case? And what difference is there between such inept illustrations and the wholly unjustifiable reference to the lottery scheme. Small wonder is it, therefore, that the District Attorney is unable to support such an instruction given in a critical case affecting men standing trial for delivery. (See cases heretofore cited in this brief showing different "schemes" within purview of present Mail Fraud Statute).

CONCLUSION

The language of the Court in *Marcante v. U. S.*, 49 Fed. (2d) 156, while applied to an entirely different situation, might well be heeded in its philosophic implications in the case at bar. There the Court said, "with inexperienced jurors such complicated testimony is too apt to become but a confused jumble, and a verdict too apt to represent an impression that the defendants are guilty of something, with little reference to the crime with which they are charged."

It is respectfully asserted, with deep and profound conviction, that the trial below was neither juristically sound nor substantially fair. For the many patent errors in the record the judgment should be reversed.

Respectfully submitted,

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